Nos. 19-15472 (L), 19-15473

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, ELECTRONIC FRONTIER FOUNDATION, AND RIANA PFEFFERKORN,

Movants–Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Respondents–Appellees.

On Appeal from the United States District Court for the Eastern District of California
Case No. 1:18-mc-00057-LJO-EPG

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In this appeal, Movants seek access to a court opinion that reportedly denied a government motion to force Facebook to compromise the security of a communications service with billions of users. In August of 2018, the U.S. Department of Justice ("DOJ") sought to compel a private actor, Facebook, to undermine security features of Messenger, an Internet-based communications service. When Facebook refused to do so, DOJ moved in sealed proceedings to hold Facebook in contempt of court. Ultimately the government lost, and a district court judge in the Eastern District of California issued a sealed opinion that presumably explained why.

The public knows only this much from news reporting.[1] Nearly everything else about this legal matter is sealed from public view. The filings in the case, the docket sheet, and even the case number are all hidden from the public eye.

To obtain the secret opinion—likely interpreting statutory language in the Wiretap Act—Movants moved to unseal in a new, separate miscellaneous action on the public docket. In that motion, the subject of this appeal, Movants asserted First Amendment and common-law rights of access to the legal ruling as well as to the

[1] *See, e.g.*, Dan Levine & Joseph Menn, *U.S. Government Seeks Facebook Help to Wiretap Messenger*, Reuters, Aug. 17, 2018, https://perma.cc/MM9M-C2XU (hereinafter "Reuters, Aug. 17, 2018"); Joseph Menn & Dan Levine, *In Test Case, U.S. Fails to Force Facebook to Wiretap Messenger Calls*, Reuters, Sept. 28, 2018, https://perma.cc/R532-3QDV (hereinafter "Reuters, Sept. 28, 2018"); Ellen Nakashima, *Facebook Wins Court Battle Over Law Enforcement Access to Encrypted Phone Calls*, Wash. Post, Sept. 28, 2018, https://perma.cc/29FP-5KTD (hereinafter "Wash. Post, Sept. 28, 2018").

docket sheet and certain other portions of the underlying proceeding. Ironically, although Movants' motion seeks judicial transparency, the district court permitted the government and Facebook to file entirely sealed responses to the motion (without permitting any reply), meaning even purely legal arguments in favor of secrecy are themselves secret. Persuaded by those secret arguments, the district court, in a short and thinly reasoned opinion, denied Movants' motion and refused to disclose a public version of the sealed opinion, the docket sheet, or any of the other materials Movants seek.

Our nation was founded on the simple principle that the people must have a say in the laws that bind them. Our courts have a deep-rooted "distrust" for secret law, on the understanding that "justice cannot survive behind walls of silence." *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966). Reflecting the people's right to know the law that governs us, both the First Amendment and the common law provide rights of access to court proceedings and documents. *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise II*), 478 U.S. 1, 8–9 (1986) (recognizing a First Amendment right of access); *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978) (recognizing a common-law right of access). Movants brought this action to exercise those rights.

The materials at issue in this case are at the core of the right of access. With reference to tradition, experience, and logic, the courts have long recognized that this right attaches to judicial opinions and docket sheets. *See, e.g.*, *Banks v. Manchester*,

128 U.S. 244, 253 (1888) (judicial opinions); *United States v. Mendoza*, 698 F.3d 1303, 1304 (10th Cir. 2012) (docket sheets). Indeed, the right of access to opinions and docket sheets is so fundamental that this Court has recognized it even when those materials relate to underlying proceedings that are entirely (and properly) sealed. *See United States v. Index Newspapers LLC*, 766 F.3d 1072, 1094 (9th Cir. 2014) (remanding for the district court to unseal docket entries and an order holding a grand-jury witness in contempt).

Contrary to the district court's analysis, Movants emphatically do *not* seek any "Title III materials" such as the wiretap application, order authorizing the wiretap, or any reports to the judge. 18 U.S.C. § 2518(1), (4), (6) (identifying Title III wiretap materials presumptively sealed by statute). And Movants do not wish to learn any sensitive details of the underlying criminal investigation that gave rise to the government's wiretap request, such as the names of informants or the names of people who were investigated but not charged.

Rather, Movants seek the docket sheet for an already decided contempt motion, as well as the court opinion denying that motion—a common-law ruling that likely interprets federal statutes and considers the scope of electronic communication providers' constitutional rights. Notwithstanding the district court's summary assertion to the contrary, this legal ruling is almost certainly segregable from any investigation-related information that may have been mentioned in the contempt

ruling. Of course, the details of a particular ongoing investigation may be properly secret, meaning—as is the norm when the qualified rights of access attach—redaction may be proper to keep some parts of the ruling and the docket sheet sealed. But the statute itself is public, *see* 18 U.S.C. § 2518, and our system of justice requires that a court's legal interpretations of the statute be public as well.

The sealed opinion may purport to define how far the government can push third parties to facilitate government surveillance of networks the public understands and relies on to be secure. The district court issued this ruling in the context of a larger public policy debate about encryption and information security. Other technology companies have a right to know the law in this area, to inform their own practices in responding to law enforcement requests. Congress has a right to know the law, to inform its own deliberations about what rules should govern in the digital age. Users of these services must know how secure the communications technologies they use are. Last but not least, the public at large must know the law, as the core prerequisite for democratic self-governance. No one can know the law without access to court opinions, and they cannot know court opinions exist without access to docket sheets. And all of this can be known without causing harm to the government's specific investigatory interests. This Court should correct the district court's errors and reverse.

JURISDICTIONAL STATEMENT

Upon the motion of any person, or upon the Court's own motion, a judge of the Eastern District of California may, upon a finding of good cause or consistent with applicable law, order documents unsealed. Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; E.D. Cal. L.R. 141(f). Pursuant to that Court's jurisdiction over its own records, on November 28, 2018, Movants moved to unseal certain judicial records under the First Amendment and common law. ER-10 (ECF No. 1). On February 11, 2019, the Court denied Appellants' motion. ER-1–5. That order was a final order that disposed of all parties' claims. This Court has jurisdiction of appeals from all final decisions of the district court. 28 U.S.C. § 1291. Appellants timely filed their Notice of Appeal on March 8, 2019. ER-6–7.

STATEMENT OF THE CASE

The public learned from a *Washington Post* news story, published on September 28, 2018, that a judge for the Eastern District of California had issued a sealed opinion denying a government effort to hold Facebook in contempt for its refusal to provide certain technical assistance in accomplishing a wiretap.[2] This case (the "Sealed Case") was and remains entirely sealed. On November 28, 2018, Movants moved to unseal certain judicial records connected to the contempt proceedings that reportedly took place in the Sealed Case. ER-10 (ECF No. 1).

[2] *See* Reuters, Sept. 28, 2018; *see also* Reuters, Aug. 17, 2018; Wash. Post, Sept. 28, 2018.

Specifically, Movants seek to unseal four categories of records: (1) any sealed docket sheets for the contempt proceedings; (2) any judicial rulings associated with those proceedings; (3) any legal reasoning presented in government submissions that was incorporated into judicial rulings; and (4) any court orders granting or denying sealing requests. Because the documents Movants seek are under seal and because the docket is also sealed, Movants do not know the judge, the case number, or the filing dates for the documents they seek. Nor can Movants include these sealed materials in the Excerpts of Record. However, the government has represented that the documents sought and the entirety of the related judicial record shall be submitted to this Court in the Appellee's sealed supplemental excerpts of record. Resp. to Mot. for this Ct. to Obtain from the Dist. Ct., and Include as Part of the Record on Appeal, Certain Sealed Materials Filed in the Dist. Ct. (Apr. 25, 2019), ECF No. 14.

On February 7, 2019, the docket sheet for Movants' public motion reflects five sealed events. ER-10 (ECF Nos. 13–17). According to the court below, these sealed events included the government's and Facebook's respective responses to Movants' motion. ER-1. The docket further shows two more sealed events dated February 8, 2019, ER-10 (ECF Nos. 18–19), and four more on February 11, 2019, ER-10 (ECF Nos. 20, 21, 23, 25). No further information about the origins, nature, or contents of these docket entries is publicly available.

The district court denied Movants' motion in a five-page public order on February 11, 2019, ER-1–5, and Movants timely appealed.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Movants did not have a First Amendment right of access to a judicial opinion, docket sheets, and any legal filings incorporated by reference into the judicial opinion.
2. Whether the district court erred in holding that Movants did not have a common-law right of access to a judicial opinion, docket sheets, and any legal filings incorporated by reference into the judicial opinion.
3. Whether the district court erred by failing to separately analyze each category of judicial records Movants sought to determine whether the First Amendment or common-law rights of access attached to them and presumptively required their disclosure.
4. Whether the district court erred in holding in the alternative that any presumptive rights of access Movants might have were nonetheless overcome, given that the opinion is not one of the types of documents presumptively sealed by the Wiretap Act and stems from an ancillary proceding, and that redaction can provide a more narrowly-tailored means to protect privacy rights and the conduct of any ongoing investigations.

STANDARD OF REVIEW

The question of whether the public has a right of access under either the First Amendment or common law is reviewed *de novo* as a matter of law, *Index Newspapers*, 766 F.3d at 1081, as are "mixed questions of law and fact that implicate constitutional rights," *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1133 (9th Cir. 2011) (citation omitted). While a district court's findings of fact are generally reviewed for clear error, appellate courts conduct a heightened, "independent review" of facts implicating issues arising under the First Amendment. *Id.*; *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). The Ninth Circuit reviews a district court's denial of a motion to unseal for abuse of discretion. *United States v. Sleugh*, 896 F.3d 1007, 1012 (9th Cir. 2018).

FACTUAL BACKGROUND

Movants seek documents related to DOJ's efforts to compel a private party, Facebook, to change its systems to enable government access to private voice calls made via the company's Messenger application. The government's efforts in this matter are the latest in a years-long campaign to regulate technology providers' use of encryption and related security features that protect individual users' privacy. The debate has focused on whether the government should undermine individuals' privacy and security in their personal communications in order to further the public interest in

efficient law enforcement. The documents at issue here are therefore a matter of preeminent public concern.

According to press reports, this case centers on "end-to-end" encryption in Facebook Messenger. *See* Wash. Post, Sept. 28, 2018. End-to-end encryption is "a system of communication where the only people who can read the messages are the people communicating." Andy Greenberg, *Hacker Lexicon: What is End-to-End Encryption?*, Wired, Nov. 25, 2014, https://perma.cc/4M2R-PCD3. End-to-end encryption differs from (and is generally considered superior to) other encryption architectures because the electronic communication service provider (here, Facebook) does not have access to the "keys" necessary to decrypt the conversations, ensuring the privacy and security of communications in transit. Providers that employ end-to-end encryption lack the technical capability to respond to government requests to intercept or otherwise disclose the contents of the conversation in legible form. *Id.* Facebook has claimed that the company does not have the ability to provide unencrypted voice data for calls made over its Messenger service. Wash. Post, Sept. 28, 2018.

Against this backdrop, several news outlets reported that in sealed proceedings in the summer of 2018, DOJ tried to compel Facebook to break the end-to-end encryption of Messenger voice calls. Journalists first reported the existence of the dispute between Facebook and DOJ on August 17, 2018. *See* Reuters, Aug. 17, 2018.

According to Reuters, the government sought a "wiretap of ongoing voice conversations by one person on Facebook Messenger," pursuant to an investigation against alleged members of the international MS-13 criminal gang. *Id.* In response, Facebook reportedly asserted that Messenger calls are end-to-end encrypted and compliance with the request would require Facebook to rewrite the Messenger platform's code and undermine its encryption for all its users. *Id*. The *Washington Post* reported that Facebook further argued that the statute that authorized the wiretap order cannot compel the company to alter Messenger. *See* Wash. Post, Sept. 28, 2018. After Facebook reportedly refused to comply with the government's demand, DOJ moved for an order to show cause why Facebook should not be held in contempt of court. *Id.* Reuters reported that a judge in the Eastern District of California heard arguments about the government's motion on August 14, 2018. *See* Reuters, Sept. 28, 2018.

In late September, news outlets widely reported that the court had denied DOJ's motion in a sealed opinion.[3] However, neither the government's legal

[3] *See* Reuters, Sept. 28, 2018; Wash. Post, Sept. 28, 2018; *see also* Tim Cushing, *DOJ Loses Another Attempt to Obtain Encryption-Breaking Precedent in Federal Court*, Techdirt, Oct. 2, 2018, https://perma.cc/5RD6-Z6SH; Krysia Lenzo, *Facebook Avoids U.S. Government Wiretap of Encrypted Messenger Phone Calls*, Fox News, Oct. 1, 2018, https://perma.cc/4TBG-3L75; Tom McKay, *Facebook Reportedly Defeats Government Demand to Wiretap Messenger Calls*, Gizmodo, Sept. 29, 2018, https://perma.cc/6BWW-7D48 (hereinafter "Gizmodo, Sept. 29, 2018); Chaim Gartenberg, *Facebook Reportedly Avoids US Government Wiretap of Messenger Voice Calls*, Verge, Sept. 28, 2018, https://perma.cc/WK9J-FJWE (hereinafter "Verge, Sept. 28, 2018"); Zack Whittaker, *US Government Loses Bid to Force*

argument nor the judge's legal basis for rejecting the government's motion has ever been made public. *See id.* ("The details of [the court's] reasoning were not available."). Nor have even the basic contours of the government's request been revealed. *See* Gizmodo, Sept. 29, 2018.[4] Subsequently, DOJ proceeded to charge sixteen suspected MS-13 gang members with multiple federal crimes in the Eastern District of California, attaching an affidavit from an FBI agent that said, in a footnote, "currently, there is no practical method available by which law enforcement can monitor" calls on Messenger. *See* Reuters, Sept. 28, 2018; Crim. Compl. at 31–32 n.20, *United States v. Barrera-Palma et al.*, No. 18-mj-150 (E.D. Cal. Aug. 29, 2018), ECF No. 20 ("*Barrera-Palma* Compl.").

Almost universally, reporting and commentary about these sealed proceedings drew comparisons to the 2016 controversy surrounding the FBI and security measures

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Facebook to Wiretap Messenger Calls, TechCrunch, Sept. 28, 2018, https://perma.cc/PB4H-YT45.

[4] Based on the limited and unverified information available, it appears the government may have sought a technical assistance order under the Wiretap Act. *See* 18 U.S.C. § 2518(4) (requiring "a provider of wire or electronic communication service" to comply with an order to furnish "technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services"); Wash. Post, Sept. 28, 2018 (explaining Facebook argued the government's request would "exceed the Wiretap Act's 'technical assistance' provision"). However, it is also possible the government sought an All Writs Act request, as it has in previous cases. *See* 28 U.S.C. § 1651(a) ("[A]ll courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). It remains unclear what authority DOJ believes it has to compel information service providers such as Facebook to design or modify their software in particular ways.

designed for Apple iPhones. *See*, *e.g.*, Wash. Post, Sept. 28, 2018; Russell Brandom, *Facebook's Encryption Fight Will Be Harder Than San Bernardino*, Verge, Aug. 20, 2018, https://perma.cc/BZ7F-NTSK; Chris Welch, *US Reportedly Pressuring Facebook to Break Messenger's Encryption Over MS-13 Investigation*, Verge, Aug. 17, 2018, https://perma.cc/XXB4-TYS4. In 2014, Apple created new "full-disk encryption"[5] methods that would make it impossible for the company to bypass the passcode on its iPhones and hand over iPhone data in response to government requests. *See* David E. Sanger & Brian X. Chen, *Signaling Post-Snowden Era, New iPhone Locks Out N.S.A.*, N.Y. Times, Sept. 26, 2014, https://perma.cc/PQ35-DWPG. This security feature became the subject of considerable national debate when the Department of Justice publicly filed a motion to compel Apple to help the FBI unlock an iPhone belonging to the gunman accused of killing fourteen people in San Bernardino, California.[6] *See* Motion to Compel Apple Inc. to Comply With This Court's February 16, 2016 Order Compelling Assistance in Search, *USA v. In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203* (*In the Matter*

[5] The FBI–Apple dispute involved full-disk encryption—that is, encryption of data stored on a device—rather than end-to-end encrypted communications in transit like those reportedly at issue here.

[6] The government has also filed requests in other jurisdictions seeking data from locked iPhones. *See* Jenna McLaughlin, *New Court Filing Reveals Apple Faces 12 Other Requests to Break Into Locked iPhones*, Intercept, Feb. 23, 2016, https://perma.cc/X5LX-RTMA.

of the Search of an Apple iPhone), No. 16-cm-10-SP (C.D. Cal. Feb. 19, 2016), https://perma.cc/T2BZ-EM3Y; *see also* Eric Lichtblau & Katie Benner, *Apple Fights Order to Unlock San Bernardino Gunman's iPhone*, N.Y. Times, Feb. 17, 2016, https://perma.cc/LB5S-U4FP.

In response to the iPhone litigation, Apple CEO Tim Cook published an open letter explaining that Apple believed complying with the court order would necessarily undermine data security for all customers. *See* Open Letter from Apple CEO Tim Cook, A Message to Our Customers, Feb. 16, 2016, https://perma.cc/5JBK-5ZHT. Apple actively resisted the government's demand in public court proceedings. *See* Apple Inc.'s Motion to Vacate Order Compelling Apple Inc. to Assist Agents in Search, and Opposition to Government's Motion to Compel Assistance, *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal. Feb. 25, 2016), ECF No. 16. The FBI ultimately found a third party to unlock the San Bernardino suspect's iPhone and dropped its case against Apple. *See* Katie Benner & Eric Lichtblau, *U.S. Says It Has Unlocked iPhone Without Apple*, N.Y. Times, Mar. 28, 2016, https://perma.cc/BKB4-XTTE.

The FBI–Apple dispute was part of a larger debate about encryption and law enforcement efforts to circumvent it, and that status was reflected in the fact that the legal dispute played out almost entirely in public. Over seventy groups and individuals filed amicus briefs in the case. Public interest organizations including

Movants ACLU and the EFF, as well as the Center for Democracy and Technology, filed briefs in support of Apple.[7] Major internet companies, including Amazon, Google, and Facebook, also supported Apple's position.[8] For its part, the government garnered amicus support from the California Police Chiefs' Association,[9] among others. Congress also took note, holding hearings about encryption and considering legislation addressing the implications of the case.[10] In short, the Apple–FBI case was part of a hugely significant—and public—legal and policy debate. Importantly, that

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[7] *See* Br. of Amici Curiae ACLU et al., *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal Mar. 3, 2016), ECF No. 57; Br. of Amici Curiae EFF et al., *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal. Mar. 3, 2016), ECF No. 60; Br. of Amicus Curiae Ctr. for Democracy & Tech., *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal. Mar. 3, 2016), ECF No. 43.

[8] *See* Br. of Amici Curiae Amazon.com et al., *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal. Mar. 4, 2016), ECF No. 86.

[9] *See* Br. of Amici Curiae Cal. State Sheriffs Ass'n et al., *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal. Mar. 4, 2016), ECF No. 90.

[10] *See The Encryption Tightrope: Balancing Americans' Security and Privacy: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2016); *Encryption and Cyber Matters: Hearing Before S. Comm. on Armed Services*, 114th Cong. (2016); *Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015); *Counterterrorism, Counterintelligence, and the Challenges of "Going Dark": Hearing Before the Select Comm. on Intelligence*, 114th Cong. (2015); *see also* Press Release, Sen. Dianne Feinstein, Intelligence Committee Leaders Release Discussion Draft of Encryption Bill (Apr. 13, 2016), https://perma.cc/4JH2-NHT4 (describing draft bill by Senators Dianne Feinstein and Richard Burr that would have required companies to decrypt customers' data in response to a court order); Staff of the H. Judiciary Comm. & H. Energy & Commerce Comm., 114th Cong., Encryption Working Group Year-End Report (2016), https://perma.cc/6PNQ-RCQH (bipartisan working group supporting encryption as a "national interest" and concluding that "this can no longer be an isolated or binary debate").

debate was informed by public court documents reflecting DOJ's and Apple's factual and legal arguments.

Today, the debate about the power of law enforcement to undermine encryption and other security measures continues, in the United States and abroad. *See, e.g.*, Ben Lovejoy, *Apple Opposing Australian Encryption Law Which Could Set a Precedent for the USA*, 9to5Mac, Oct. 3, 2018, https://perma.cc/LY4K-TWN9; Christopher Wray, Director, FBI, Remarks at Fordham University–FBI International Conference on Cyber Security: Raising Our Game: Cyber Security in an Age of Digital Transformation (Jan. 9, 2018), https://perma.cc/RBJ5-UJQ7 (calling encryption "an urgent public safety issue"). Some 1.3 billion people around the world use the Facebook Messenger app, making the government's efforts in this matter of extraordinarily broad public concern.[11]

The history of the *Apple v. FBI* dispute—and the fact that the government did not even file that case under seal, or oppose broad public participation in it—shows that how courts interpret the extent of government authority to regulate encryption and communications security can and should be debated openly and publicly. That principle applies with equal force in this case. *See, e.g.*, Greg Nojeim, Eric Wenger & Marc Zwillinger, *FBI vs. Facebook Messenger: What's at Stake?*, Ars Technica, Oct. 2, 2018, https://perma.cc/5UGD-2U9S (arguing that use of the Wiretap Act in this

[11] *See* Sean Kelly, *Messenger's 2017 Year in Review*, Facebook (Dec. 13, 2017), https://perma.cc/WN9B-B6AQ.

case would be "a dramatic expansion of the government's authority to commandeer services in ways that interfere with their expected use"); Amy Davidson Sorkin, *The Dangerous All Writs Act Precedent in the Apple Case*, New Yorker, Feb. 19, 2016, https://perma.cc/K46W-FXGQ (calling use of the All Writs Act to order decryption "fairly novel"). Yet here, the district court's reasoning in this highly important case, which raises similar policy issues and has potentially great consequences for providers and the public, remains under seal.

PROCEDURAL HISTORY

After the public learned that a judge for the Eastern District of California had issued a written opinion denying DOJ's efforts to hold Facebook in contempt, on November 28, 2018, Movants moved to unseal certain judicial records connected to this contempt proceeding. ER-10 (ECF No. 1).

The motion sought to unseal four types of records:

- any sealed docket sheets related to the contempt proceeding;
- any judicial rulings associated with the aforementioned proceeding;
- any legal analysis presented in government submissions incorporated, adopted, or rejected implicitly or explicitly in such judicial rulings; and
- any court orders on sealing requests.

Appellants sought these materials because public access to them is critical to the public's understanding of the scope of government authority to regulate encrypted communications platforms. The docket sheets will allow the public to understand the

procedural history of DOJ's dispute with Facebook and to identify documents of public interest that may merit unsealing. The court's opinion would inform Congress, other courts, electronic communications service providers, their users, and the public of judicial interpretations of law with regard to the government's legal authority to compel technical assistance from private parties. Any government submissions incorporated, adopted, or rejected by the district court in its ruling would ensure that the court opinion will be intelligible. And access to any court orders on sealing requests would inform the public of the reasons for judicial secrecy surrounding such important proceedings.[12]

Although Movants filed their motion on the public docket, the litigation over it played out entirely behind closed doors. Facebook and the government responded to the motion in sealed filings that Movants were not able to read—or reply to—at all. ER-1. Almost immediately thereafter, the District Court denied the motion in an order just over four pages long. ER-1–5.

The order first expressed the court's view that the contempt-related materials sought by the motion "contain and pertain" to sensitive wiretap information, and

[12] Under Eastern District local rules, notice that a request to seal has been made will "typically be filed in the publicly available case file." E.D. Cal. L.R. 141(a). Further, unless the Court orders otherwise, court orders sealing documents "will also be filed in the publicly available case file and will not reveal the sealed information." *Id.* This is because "all information provided to the Court in a specific action is presumptively public," E.D. Cal. L.R. 141.1(a)(1), and any reasons for deviating from this principle should be explained to the public.

"directly flow" from orders granting Title III wiretap requests. ER-3.[13] Based on that conclusion, the court held that the public does not have a First Amendment right of access to any of the requested materials in light of statutory language contained in the Wiretap Act, which the court said seals certain "Title III materials" unless good cause is shown to unseal them. *Id.* Additionally, the court asserted that the First Amendment right of access did not attach because the underlying investigation is ongoing. ER-3–4. The court further held that, even if there were a First Amendment right of access to the records sought, the government's compelling interest in "preserv[ing] the secrecy of law enforcement techniques" as a general matter justified blanket secrecy. ER-4 (reasoning that the technology at issue "if disclosed publicly, would compromise law enforcement efforts in many, if not all, future wiretap investigations"). Further, the court articulated its judgment that there was no viable way to redact or segregate sensitive investigatory information contained in the legal and factual arguments in the record. *Id.* Finally, the court summarily stated that no common-law right of access attaches either, in light of the statutory language of Title III. *Id.* Notably, the court did not address whether the Sealed Case and/or contempt proceeding docket sheet(s) or its sealing orders should be made public.

SUMMARY OF ARGUMENT

[13] As explained above and below, Appellants are not seeking wiretap recordings, applications, or orders granting wiretap authorization. Rather, they seek materials, including a judicial opinion, in a related contempt proceeding concerning the scope of the government's technical assistance authority.

The district court improperly relied on the sealing provisions of the Wiretap Act to hold that neither the First Amendment nor the common-law right of access attaches to the materials Movants seek, which include a judicial opinion, related docket, and government briefing the court incorporated in its opinion. As a result, it committed several legal errors.

First, the court mistakenly held that the Wiretap Act precluded the rights of access from attaching to these traditionally public categories of documents. The Wiretap Act does not create such broad secrecy or prohibit disclosure. Controlling law from this Court demonstrates that experience and logic strongly support a First Amendment right of access to the materials and that there is a long tradition under the common law right of access to those materials, too.

Second, the district court failed to separately analyze each category of records Movants sought to determine whether the rights of access attach, counter to what this Court's authority requires. The fact that such materials were in some way related to another proceeding under the Wiretap Act is insufficient to bar the rights of access from attaching here.

Third, the district court defied reason and common sense in holding that it could not release a single word contained the judicial records Movants sought. The presumptive rights of public access under both the First Amendment and common law recognize that redaction can address compelling concerns for secrecy here.

Fourth, the district court failed to offer specific facts sufficient to allow this Court to determine whether denial of Movants' petition was proper.

More broadly, the district court gave little weight to the public's rights of access to the materials at issue here, which are a matter of intense public interest. Indeed, keeping these matters sealed materially interferes with the long-recognized public interest in democratic oversight of both the courts and law enforcement. For the reasons stated below, this Court should hold that the rights of access attach to the court opinion and docket sheet Movants seek, and that either the government has not shown any countervailing reason to keep the materials sealed any longer or, if it has, that redactions can address those concerns.

This Court should order the documents unsealed and remand to the district court with specific instructions for how to apply redactions without violating Movants' rights of access.

ARGUMENT

Under both the First Amendment and common law, the public is entitled to access the docket sheet, judicial opinion, any legal arguments submitted by the government that are incorporated, adopted, or rejected implicitly or explicitly in such judicial rulings, and sealing orders associated with the district court's rejection of DOJ's motion to compel Facebook to break its encryption on its Messenger service. The district court's cursory analysis on these questions misidentified both the type of

information presumptively sealed under the Wiretap Act and the category of judicial materials Movants seek, to which the court applied its right-of-access analysis. As a result, the court ruling was in error. Additionally, it did not even address Movants' claim concerning the docket sheet. In its *de novo* review, this Court should correct these mistakes.

Importantly, the Wiretap Act presumptively seals three types of documents: recordings of intercepted communications, applications made, and orders granted. 18 U.S.C. § 2518(8)(a)–(b). The Act does not require sealing of other types of wiretap-related documents (such as orders denied). Nor does it require sealing of information even when that information is contained in sealed recordings of intercepted communications, wiretap applications, or orders. The chapter of DOJ's Justice Manual on electronic surveillance states:

> [T]he government attorney should not attach Title III affidavits or other application material as exhibits to any search warrant affidavit, complaint, indictment, or trial brief. The government attorney *may, nevertheless, use information from these materials or the Title III interceptions in documents* such as search warrant affidavits, complaints, indictments, and trial briefs.

DOJ, Justice Manual § 9-7.250 (emphasis added) (citing 18 U.S.C. §§ 2517(1),(2), (8)(a); S. Rep. No. 1097 at 2188), https://perma.cc/TEU6-P3MQ.

Indeed, public court documents regularly include material "containing and pertaining" to and "directly flowing" from wiretap orders, as, for example, in the *Barrera-Palma* Complaint that reportedly stemmed from the Sealed Case wiretap

proceeding. *See, e.g.*, *Barrera-Palma* Compl. ¶ 87 (containing Facebook messages allegedly exchanged between two defendants). There is no legal basis for the assertion that any and every document "containing" information from, "pertaining to" or "flowing from" a wiretap proceeding, especially including a judicial opinion, is presumptively sealed by statute.

This is common sense. Courts regularly issue public opinions interpreting various provisions of the Wiretap Act, including challenges to the statute's "technical assistance" provisions.

Nevertheless, in a single paragraph citing a single district court case from outside this Circuit, the court disposed of the entire "history and logic" analysis required in cases raising claims under the First Amendment right of access. ER-3–4 (citing *United States v. Blagojevich*, 662 F. Supp. 2d 998, 1004 (N.D. Ill. 2009)). In doing so, the district court erroneously identified Movants' request as seeking "Title III wiretap materials" presumptively sealed by statute. ER-3. It likewise relied on that erroneous classification in analyzing the common law right of access. ER-4. But as explained above, Movants' motion did not seek presumptively sealed materials—Title III recordings, wiretap applications or orders granted. Title III does not even presumptively seal all information contained in those sealed documents, never mind categorically sealing documents filed regarding a separate, ancillary motion to compel.

The judicial records movants seek, created in proceedings ancillary to the government's wiretap application, are at the heart of the First Amendment and common-law rights of access. Courts have consistently recognized that judicial opinions and docket sheets are records that fall squarely within the public's access rights. Those rights of access do not dissipate because the docket or judicial opinion is ultimately related to confidential law enforcement surveillance applications and orders. Precedent from the Supreme Court and this Court itself compel that conclusion.

To the extent that public disclosure could implicate legitimate privacy interests or jeopardize an ongoing investigation, those portions of the opinion and docket can be redacted.

I. The First Amendment and common-law rights of access compel the unsealing of the judicial opinion related to the contempt proceeding.

A. The First Amendment right of access attaches to the judicial opinion.

The qualified First Amendment right to access judicial records attaches when the "experience and logic" test is satisfied—that is, (1) when a record has "historically been open to the press and general public" and (2) when "public access plays a significant positive role in the functioning of the particular process." *Press-Enterprise II*, 478 U.S. at 8. When the right attaches, it "may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9.

This Court has explained that while "our cases refer to this as the 'experience and logic' test, it's clear that these are not separate inquiries," and that "logic alone, even without experience, may be enough to establish the right." *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008). Even without an "unbroken history of public access," the First Amendment right exists if "public scrutiny" would "benefit" the proceedings. *Seattle Times Co. v. U.S. District Court*, 845 F.2d 1513, 1516–17 (9th Cir. 1988). Judicial "records are public documents almost by definition, and the public is entitled to access by default." *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). This presumptive right of access to court documents is well-established in the Ninth Circuit—and, indeed, this Court has construed it broadly.[14]

The district court's analysis of the First Amendment question was based on two demonstrably faulty premises. The first was that Movants' motion sought to unseal

[14] *Wood v. Ryan*, 759 F.3d 1076, 1081–82 (9th Cir.) (collecting cases), *vacated*, 573 U.S. 976 (2014); *see, e.g.*, *Oregonian Publ'g Co. v. U.S. District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990) ("Under the first amendment, the press and the public have a presumed right of access to court proceedings and documents."); *see also Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014) ("[T]he federal courts of appeals have widely agreed that [the First Amendment right of access] extends to civil proceedings and associated records and documents."); *Phoenix Newspapers, Inc. v. U.S. District Court*, 156 F.3d 940, 946–49 (9th Cir. 1998) (recognizing qualified right to transcripts of closed post-trial proceedings); *Seattle Times Co.*, 845 F.2d at 1514–17 (recognizing qualified right to pretrial release proceedings and related documents); *CBS, Inc. v. U.S. District Court*, 765 F.2d 823, 824–26 (9th Cir. 1985) (recognizing a qualified right of access to post-trial documents).

"Title III wiretap materials," ER-3—which Appellants do not seek. Second, the court erroneously assumed that any related documents or information—even that tangentially connected to any wiretap recordings, applications, or orders granted—must also be sealed. The lower court was wrong, especially in light of the fact that Movants are primarily interested in obtaining the judicial opinion laying out the legal reasoning for the denial of the government's contempt motion to force Facebook to assist the government's decryption of Facebook Messenger communications. *See* Reuters, Sept. 28, 2018; Wash. Post, Sept. 28, 2018.

The experience and logic test requires that the public have access to this judicial decision.

First, there is a nearly unbroken tradition of public access to judicial opinions because they form the bedrock of our constitutional system. The district court erred by failing to consider, much less address, that experience required access to the order here. ER-3. At the Founding, public judicial decisionmaking was taken as a given in the creation of the American justice system. Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 Fed. Cts. L. Rev. 177, 191–97 (2009). By the late nineteenth century, the Supreme Court had held that judicial decisions were "free for publication to all." *Banks*, 128 U.S. at 253; *see Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1239 (11th Cir. 2018) ("We understand the rule in *Banks* to derive from first principles about the nature of law in our

democracy. Under democratic rule, the People are sovereign, they govern themselves through their legislative and judicial representatives, and they are ultimately the source of our law."); *see also Nash v. Lathrop*, 6 N.E. 559, 560–61 (Mass. 1886) ("Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions.").

Modern courts have upheld rights of access to court opinions based on these principles. *See Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records."). As the Third Circuit explained in *Lowenschuss v. West Publishing Co.*, because "ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning *demands* wide dissemination of judicial decisions. . . . Accordingly, under our system of jurisprudence the judiciary has the duty of publishing and disseminating its decisions." 542 F.2d 180, 185 (3d Cir. 1976) (emphasis added) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 20, 21–22 (1963)).

Second, logic supports access to judicial opinions. As this Court has explained, "[w]here access has traditionally been granted to the public without serious adverse consequences, logic necessarily follows." *In re Copley Press*, 518 F.3d at 1026 & n.2 (explaining that "logic alone, even without experience, may be enough to establish the

right" of access in this Circuit). The functioning of our common-law system depends on courts making their opinions publicly accessible, so that litigants and judges may rely on each other's reasoning to guide their own. *See, e.g.*, *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole."); *Penny v. Little*, 4 Ill. 301, 304 (1841) ("The common law is a beautiful system; containing the wisdom and experience of ages."). Additionally, public access to opinions is a prerequisite for public scrutiny of the courts and their decisions, including scrutiny by Congress. *Index Newspapers*, 766 F.3d at 1093 (holding that public access to contempt order "provides a check on the process by ensuring that the public may discover when a witness has been held in contempt and held in custody"); *Doe Co. v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) ("Without access to judicial opinions, public oversight of the courts, including the processes and the outcomes they produce, would be impossible."); *see also Encyclopedia Brown Prods. v. Home Box Office, Inc.*, 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998) ("There is a particularly strong presumption of public access to such decisions as well as to the briefs and documents submitted in relation thereto. The court's decisions are adjudications—direct exercises of judicial power the reasoning and substantive effect of which the public has an important interest in scrutinizing.").

Here, the logic of public access is especially weighty. The district court's ruling

likely determined the due process, property, First Amendment, and other rights of Facebook as well as the limits on the government's ability to force the company to provide the technical assistance it desired. As was true during the *Apple v. FBI* litigation discussed above, disclosure would allow the public to scrutinize that decision, understand what authority to compel the government has, and what rights private parties have in resisting that compulsion. *See Press-Enterprise II*, 478 U.S. at 8. Further, the district court may be the first court to have ruled on whether the federal government can force an electronic communication service provider to undermine its own security architecture to aid a criminal investigation. Other litigants—including private companies, some of which may be less well-resourced or legally sophisticated than Facebook and which may now or in the future receive requests for technical assistance in carrying out surveillance requests—should have access to the district court's opinion so that they may rely on, respond to, or distinguish that court's reasoning if and when factually analogous cases arise.

If other courts have been ruling on this same question, a body of secret common law is being created, one that judges deciding or who will decide the same issue in the future cannot know. Moreover, public access to the kind of judicial opinions at issue here will assist Congress in its oversight functions. If Congress is left in the dark about what its laws have come to mean inside courtrooms, it cannot properly evaluate, amend, or clarify them. And dialogue between the courts and

Congress is a regular feature of public laws.[15]

The district court held that the First Amendment right did not attach because the court order arose out of presumptively sealed "Title III materials," but that was error for two reasons.

First, the documents Movants seek are not themselves sealed by statute. Nor does the statute limit public disclosure of information contained in sealed documents. So even if the opinion, orders, and dockets Movants seek "contain" wiretap information or "pertain" or "flow from" wiretap proceedings, Title III's sealing provisions do not apply. In any case, a constitutional right of court access trumps a statutory sealing provision. *State v. Chen*, 309 P.3d 410, 415 (Wash. 2013) (citing *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607–09 (1982)). Where the First Amendment right attaches to records, "statutory language that protects [their] confidentiality," ER-3, cannot—standing alone—overcome that right.

Second, this Court has already held that the First Amendment right of access applies to a judicial opinion ancillary to a proceeding that is traditionally secret, just

[15] For example, Congress passed the Communications Act of 1934 in reaction to *Olmstead v. United States*, 277 U.S. 438 (1928). Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (including Title III, the Wiretap Act) in reaction to *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). The Foreign Intelligence Surveillance Act was passed to answer the question left open by the Supreme Court's decision in *United States v. U.S. District Court* (*Keith*), 407 U.S. 297 (1972), of whether surveillance of foreign powers requires a warrant under the Fourth Amendment. *See* Jennifer Granick, *American Spies: Modern Surveillance, Why You Should Care, and What to Do About It* 172–87 (2017).

like the one at issue here. *Index Newspapers*, 766 F.3d at 1092–94 (requiring unsealing of contempt order under the First Amendment right of access in case arising from grand jury investigation). This Court's decision in *Index Newspapers* also requires district courts to separately determine whether a First Amendment right of access to judicial records exists based on the history and logic of access to those types of records or proceedings, even when they arise in the context of other proceedings that are historically secret. *Id*. at 1095 ("Rather, when a motion to unseal is filed and ancillary proceedings have become attenuated from the grand jury, the district court has a duty to conduct an analysis to determine whether particular types of filings should be unsealed.").

In *Index Newspapers*, a grand jury was investigating crimes that took place around a public protest in Seattle, but two witnesses it had called to testify refused to appear. *Id.* at 1079. In a closed courtroom, a district court conducted "ancillary contempt proceedings," after which it held the two witnesses in contempt, ordered them confined, and issued written orders to that effect. *See id.* at 1078. "Presumably due to" a district rule "seal[ing] as a matter of course" all "motions and accompanying papers related to grand jury proceedings," all of the district court records related to the contempt proceedings were sealed, including the docket sheets. *Id.* at 1080; *see also id.* at 1083. When a journalist filed a motion for public access to the district court contempt-related records, the district court denied the request, holding that "there is

no public right of access to grand jury proceedings and, likewise, no public right of access to the court record of proceedings held ancillary to grand jury investigations." *Id.* at 1080.

This Court reversed. Though acknowledging that "[s]ecret proceedings are the exception rather than the rule in our courts," the Court noted that grand jury proceedings are a rare exception. *Id.* at 1084 (citing *Oregonian Publ'g Co.*, 920 F.2d at 1465). That did not end the matter, however. Instead, the Court applied the "experience and logic" test to the different categories of documents sought by the public-access motion, concluding that while the First Amendment right of access did not attach to materials that were inextricably part of sealed grand jury proceedings, a presumptive First Amendment right of access *did* attach to, among other things, "orders holding contemnors in contempt and requiring their confinement." *Id.* at 1084–85. As the Court explained, "[l]ogic dictates that at least some of the filings related to contempt hearings ancillary to grand jury investigations may be open to the public because of the hearings' similarities to criminal trials." *Id.* at 1093. That is because "[t]he public plays a significant positive role in contempt proceedings by providing a watchful eye." *Id.* at 1089.

The reasoning of *Index Newspapers* directly applies to the opinion sought by Movants in this case, showing why the district court's analysis was wrong. As *Index Newspapers* makes clear, the fact that an ancillary judicial opinion is issued in the

context of a legitimately sealed underlying proceeding (there, the grand jury; here, the wiretap application) is irrelevant to the right-of-access question. And just as in that case, the experience-and-logic test compels public access to the opinion here.

B. The common-law right of access attaches to the judicial opinion.

The district court relied on the same misconception about the opinion Movants seek when rejecting their claim under the common-law right of access.

As under the First Amendment, judicial opinions are at the heart of the common-law right of access. Court opinions have historically been public because "resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Kamakana*, 447 F.3d at 1179 (quotation marks omitted). Importantly, this Court in *Kamakana* held that only a "narrow range of documents" is exempt from the common-law right of public access. *Id.* at 1178. It further instructed that in determining whether a record sought under the common-law right of access has historically been secret, lower courts should focus on the type of record sought, and not the proceeding under which it arose. *Id*. (identifying only grand jury materials and pre-indictment search warrant materials as those that have historically been secret).

For similar reasons as those given above, the district court's fixation on the idea that all "Title III materials" are statutorily sealed led it to the wrong conclusion. The court should have asked whether judicial opinions are subject to the common-law

right of access. Clearly, they are. Further, in *Index Newspapers*, this Court held that "when a motion to unseal is filed and ancillary proceedings have become attenuated from the grand jury, the district court has a duty to conduct an analysis to determine whether particular types of filings should be unsealed." 766 F.3d at 1095. This Court has made similar distinctions in other contexts. *See United States v. Bus. Of Custer Battlefield Museum & Store Located at Interstate 90, Exit 514, S. of Billings, Mont.*, 658 F.3d 1188, 1193 (9th Cir. 2011) (distinguishing between rights of access to warrant materials during and after an investigation); *see also Kamakana*, 447 F.3d at 1179 (common-law right of access applies to dispositive motions subject to a protective order because such motions have historically been public).

Beyond the historic right of access to judicial opinions as a necessary part of public understanding of the law, *Index Newspapers* exemplifies why the court order on the motion to compel should be unsealed. There, as here, an open hearing in a contempt proceeding serves "an important check on the court and the government" by allowing the public to understand the basic nature of the dispute and the court's reasons for holding the individual in contempt. 766 F.3d at 1091. The same logic and principles apply here: disclosing the opinion denying the government's motion to compel would assist the public in understanding the district court's reasoning for denying the request while also providing an important check on the government.

Movants also seek access to the legal analysis presented in filings made as part of the contempt proceeding that were incorporated, adopted, or rejected explicitly or implicitly in the court's order. ER-3–4. Since these materials are part of the judicial opinion, the arguments in favor of unsealing the opinion fully apply to these incorporated, adopted, or rejected portions of the briefings. *See Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 895, 897–98 (7th Cir. 1994) (the public has a right to access "any documents" on which the court may rely "in making its decisions"; "particular documents" may become "part of the public record . . . because the court has relied on them"), *superseded on other grounds as recognized by Bond v. Utreras*, 585 F.3d 1061, 1068 n.4 (7th Cir. 2009); *Kamakana*, 447 F.3d at 1179 (holding "that the strong presumption of access to judicial records applies fully to dispositive pleadings"). The district court also erred by failing to hold that the First Amendment and common-law rights of access attached to any briefing that was later incorporated into the district court's order denying Movants' motion. ER-3–4.

Rather than conduct the right-of-access analysis this Court requires and analyze the ancillary materials on their own merits, the district court held that the Wiretap Act's sealing provisions supplanted the public's common law right of access and makes every pertinent record secret. ER-4. The district court's unbounded determination that somehow the Wiretap Act means even judicial records reflecting

the ancillary dispute between the government and Facebook are beyond the reach of the public's presumptive right of access was legal error.[16]

Clearly, that is not the law: courts, including this Court, regularly issue public opinions on disputes arising from wiretap orders. *See, e.g., In the Matter of the Application of the United States for an Order Authorizing the Roving Interception of Oral Commc'n* (*In re Company*), 349 F.3d 1132 (9th Cir. 2003); *United States v. Illinois Bell Tel. Co*., 531 F.2d 809 (7th Cir. 1976); *Application of U.S. for an Order Authorizing Installation of Pen Register Touch-Tone Decoder Terminating Trap*, 458 F. Supp. 1174 (W.D. Pa. 1978); *see also* Order Compelling Apple, Inc. to Assist Agents in Search, *In the Matter of the Search of an Apple iPhone*, No. 16-cm-10-SP (C.D. Cal Feb. 19, 2016), ECF No. 1 (ordering Apple to provide technical assistance pursuant to the All Writs Act and describing the technical acts that Apple was ordered to do), *order vacated*, ECF No. 210 (Mar. 29, 2016).

C. The district court erred in concluding that wholesale sealing of the opinion was justified in this case under the First Amendment and common law.

[16] The same reasons compel the conclusion that in addition to the judicial opinion, any court orders on sealing requests must likewise be unsealed on both First Amendment and common-law grounds. The Wiretap Act does not presumptively seal these orders; they are indisputably judicial documents; court orders have not traditionally been kept secret; these orders are ancillary to the underlying wiretap application; and access to them would inform the public of the reasons for keeping secret the government's efforts to have Facebook held in contempt. The local rules state that sealing orders should be filed on the public docket. E.D. Cal. L.R. 141(d). And, as the following section explains, any sensitive information in those sealing orders can be redacted.

The presumption of access to judicial opinions and docket sheets under the First Amendment and common law requires a court to consider alternatives to complete closure. But because it erroneously concluded neither right of access applied, the district court here conducted only an extremely cursory analysis. Instead, it asserted that redaction of sensitive information "is not a viable option here," conclusorily explaining that "the requested material is so entangled with investigatory secrets that effective redaction is not possible." ER-4.[17] This was error.

Once the First Amendment right of access attaches, the presumption of access can be overcome only by a compelling interest for closure that preserves those higher values and is narrowly tailored to preserve that interest. *Press-Enterprise II*, 478 U.S. at 9; *Phoenix Newspapers*, 156 F.3d at 949. Redaction of sensitive information achieves this narrow tailoring because the release of the judicial ruling in this case would "ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 605. "Furthermore, the court ordering closure must 'make specific factual findings,' rather than 'bas[ing] its decision on conclusory assertions alone." *Phoenix Newspapers*, 156 F.3d at 949.

Similarly, the government can only overcome the common-law right of access by "articulat[ing] compelling reasons supported by specific factual findings that

[17] Indeed, the district court's decision that redaction is not possible is so conclusory that it does not allow for the "fair assessment of the trial judge's reasoning by the public and the appellate courts." *Phoenix Newspapers*, 156 F.3d at 951.

outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178–79 (citations omitted). The court must "conscientiously balance[] the competing interests" of the public and of the party who seeks to keep judicial records secret. *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003).

First, even if there are legitimate reasons for ongoing secrecy for some portions of the judicial record here, the district court was still obligated to address alternatives to continued sealing of the entire record in order to protect the public's right of access.[18] This Court has repeatedly found that alternatives to closure, such as redaction, must be considered when weighing the public's right of access against a compelling interest in secrecy. *See e.g.*, *Phoenix Newspapers*, 156 F.3d at 949; *Oregonian Publ'g Co.*, 920 F.2d at 1466 ; *United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982). Instead of wholesale sealing, redaction is the appropriate and effective way to protect law enforcement and privacy interests, while vindicating the public's right of access as well. *See Custer Battlefield Museum*, 658 F.3d at 1195 n.5 (finding that competing concerns can typically be accommodated "by redacting sensitive information rather than refusing to unseal the materials entirely").

As explained above, Movants have no interest in the details of ongoing

[18] Because the filings below responding to the Motion to Unseal remain sealed, Movants are at a disadvantage in assessing any of the government's or Facebook's asserted interests in sealing. Without doubt, however, the district court's analysis was perfunctory, overbroad, and in conflict with Circuit precedent.

criminal investigations, such as the names of informants or the names of people who were investigated but not charged. Given the nature of judicial opinions, it is exceedingly likely that alternatives short of wholesale sealing could adequately address the government's concerns about sensitive investigatory details. Even the Foreign Intelligence Surveillance Court—a judicial body tasked with adjudicating matters relating to national security—has released redacted versions of its opinions containing significant interpretations of law. *See, e.g.*, Order, *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, No. BR 06-05 (F.I.S.C. May 24, 2006), https://perma.cc/2CPA-KLEE (approving the government's request for authorization to collect bulk telephony metadata); *see also* James R. Clapper, DNI Clapper Declassifies Intelligence Community Documents Regarding Collection Under Section 501 of the Foreign Intelligence Surveillance Act (FISA), IC on the Record (Sept. 10, 2013), https://perma.cc/WUA7-LP7E. Congress in 2015 mandated that the Executive Branch review and release all significant FISC opinions "to the greatest extent practicable," including by redacting sensitive information. *See* USA FREEDOM Act, H.R. 2048, 114th Cong. § 402 (enacted 2015) (requiring the Director of National Intelligence to review decisions by both the FISC and its appellate court of review that contain "a significant construction or interpretation of any provision of law," and make them "publicly available to the greatest extent practicable" by redacting

sensitive information as necessary), *codified at* 50 U.S.C. § 1872.

Second, facts in the record suggest that redaction is readily possible in this case. The court acknowledged that Facebook supported the limited redaction of the materials Movants sought, *see* ER-2,[19] but this does not seem to factor into the court's redaction analysis. The court's lack of analysis makes it impossible for the public to understand why Facebook counseled for redactions but the court decided against them.

Third, the court failed to take account of the fact that certain details about this matter are already public knowledge. As described above, Reuters and the *Washington Post* have reported that the Department of Justice attempted to use the technical-assistance provisions of the Wiretap Act to gain access to Facebook Messenger encrypted voice calls. This request was made in the investigation and prosecution of MS-13 suspected gang activity. The obstacle was Messenger's end-to-end encryption. The public knows that it may be possible to defeat end-to-end encryption. Lily Hay Newman, *Encrypted Messaging Isn't Magic*, Wired, June 14, 2018, https://perma.cc/DS8B-MJNH. The public knows that the government did not succeed in forcing Facebook to change Messenger's operation. Confirming these

[19] The district court opinion says that Facebook agrees that the opinion should be unsealed, subject to certain redactions for "trademark" reasons. ER-2. Movants presume that the court meant "trade secret" as trademark law provides no basis for secrecy or confidentiality. Movants reserve the right on remand to contest the portions of the opinion Facebook (and the government) designate for redaction.

reported facts through the issuance of a redacted judicial opinion could not jeopardize any of the interests the district court relied upon to justify its decision. *See In re Grand Jury Subpoena, Judith Miller*, 493 F.3d 152, 154–55 (D.C. Cir. 2007) (ordering release of redacted portions of documents where the "cat [was] out of the bag").

Fourth, the district court's broader assertion that public information about the court's analysis of Facebook's technical assistance obligations could harm all future wiretaps is insupportable. *See* ER-4. The public knows about the existence of sensitive law enforcement tools, and that the government wiretaps phone and Internet conversations, analyzes DNA and fingerprints, tracks phone locations with cell site simulators, obtains email messages from providers, infiltrates gangs, uses "sneak and peek" warrants to install secret cameras and microphones, and more. This knowledge does not interfere with law enforcement's use of those techniques in specific cases. But secrecy would cripple democratic oversight. The ways in which law enforcement carries out wiretap and other surveillance orders are regulated and overseen by the courts that authorize those orders—which, in turn, are overseen by the public and its elected representatives.

The public already knows a great deal about the fact that the government can intercept people's communications under Title III. The public knows how frequently the government seeks wiretaps because the statute requires reporting. 18 U.S.C.

§ 2519(3). The public knows that in some cases the government can compel technical assistance to wiretap, because it is in the statute. 18 U.S.C. § 2518(4). No harm can flow from public awareness that the government has sought a wiretap to record the contents of parties' communications on a major communications service, that the service offers end-to-end encryption, that the provider resisted or was technologically unable to assist, or that the court sided with the company. Indeed, in many ways, disclosure *serves* the government's interest by assuring the public that such surveillance occurs under a legal regime and has adequate safeguards, such as public oversight, in place.

Fifth, the court gave outsized weight to the fact that the investigation at issue remains "ongoing." ER-4. Though indictments related to the wiretap have issued, it may be true that certain elements of the investigation continue today. That may be enough under some circumstances to justify continued sealing of the wiretap applications and orders. *See Times Mirror Co. v. United States*, 873 F.2d 1210, 1217 (9th Cir. 1989). But that is plainly insufficient to justify wholesale sealing of a court opinion, especially one issued regarding an ancillary matter. Court opinions can be, and are regularly, published in such a way as to reveal legal reasoning without compromising law enforcement interests. *See, e.g.*, *In re Company*, 349 F.3d 1132; *United States v. Daoud*, 761 F.3d 768 (7th Cir. 2014) (redacting classified investigatory information and techniques); *In re Grand Jury Subpoena No. 7409*, No.

18-41 BAH (D.D.C. Jan. 30, 2019) (redacting name of foreign company and information related to special counsel Robert Mueller ongoing investigations).

Sixth, the court failed to consider alternatives to closure or redaction that would result in meaningful disclosure without harming government interests. *See, e.g.*, *Brooklier*, 685 F.2d at 1169 (lower court erred by only discussing one alternative to closure). The court could have considered options such as issuing an opinion that contains the relevant factual information and legal analysis while excluding sensitive law enforcement or trade secret information. *See, e.g.*, Order, *In re Company*, No. 02-15635 (9th Cir. Sept. 23, 2003), ECF No. 26 ("As this case was litigated under seal, we have drafted the opinion with secrecy concerns in mind, redacting all identifying information of which we were aware.").

For all of these reasons, the district court erred in ordering blanket sealing of the opinion. To preserve the longstanding right of access the public has to judicial opinions, this Court should order the opinion unsealed, or remand for redaction accompanied by clear explanations about why those redactions were made.

II. The First Amendment and common-law rights of access compel the unsealing of the docket sheet related to the contempt proceeding.

A. The First Amendment right of access attaches to the docket sheet, which must be disclosed.

The district court erred by failing to even address Movants' motion that it unseal any sealed docket sheets associated with DOJ's motion to hold Facebook in contempt of court.

The First Amendment right of access to docket sheets is well established. Historically, docket sheets have been necessary to enable the public's right to access the underlying proceedings in a case; otherwise the right is all but meaningless. A docket sheet functions like the "table of contents" for a case; without it, "a reader is left without a meaningful mechanism by which to find the documents necessary to learn what actually transpired in the courts." *Globe Newspaper Co. v. Fenton*, 819 F. Supp. 89, 94 (D. Mass. 1993). By indexing what happens in a case, docket sheets "facilitat[e] … the public's ability to speak and publish information about court proceedings." Meliah Thomas, Comment, *The First Amendment Right to Docket Sheets*, 94 Cal. L. Rev. 1537, 1564 (2006) ("Thomas").

"Logic supports this judgment of history. . . . [D]ocket sheets do not constitute the kinds of government records that function properly only if kept secret." *Hartford Courant v. Pellegrino*, 380 F.3d 83, 95–96 (2d Cir. 2004) (citing *Press-Enterprise II*, 478 U.S. at 8–9).[20] That is because, by "provid[ing] a map of the proceedings in the underlying cases," docket sheets enhance both the fairness of court proceedings and

[20] *Pellegrino* noted the sole exception of "grand jury proceedings, which … are entitled to a presumption of secrecy." 380 F.3d at 96 (citing *In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000); collecting cases from Fourth, Eighth, and Eleventh Circuits affirming First Amendment right of access to docket sheets in other contexts). But even in that exceptional case, the D.C. Circuit has recognized that under the local criminal rule governing grand jury secrecy, the public may ask the court for a redacted public docket for an ancillary proceeding in specific instances "in which continued secrecy is not necessary to prevent disclosure of matters before the grand jury." *In re Sealed Case*, 199 F.3d at 526–27.

the appearance of fairness, "reveal potential judicial biases or conflicts of interest," and allow the public to better understand how the legal system functions, both writ large and in an individual case. *Id.* at 95–96 (citations omitted).

Even when underlying case entries are sealed, the public needs docket sheets to learn about and challenge sealing decisions for particular filings in the case. "[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives." *Phoenix Newspapers*, 156 F.3d at 949. These "procedural and substantive safeguards . . . provide the essential, indeed only, means by which the public's voice can be heard." *Id.* at 951. That requisite notice and opportunity to object cannot happen if the docket sheet itself is sealed from the public eye. A sealed docket sheet thus "can effectively preclude the public and the press from seeking to exercise their constitutional right of access" to court proceedings. *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993). In short, the right of access to docket sheets is a prerequisite to exercising the right of access to other court records.

It is unsurprising, then, that there is a "centuries-long history of public access to dockets." *United States v. Mendoza*, 698 F.3d 1303, 1304 (10th Cir. 2012) ("Dockets and docket sheets have traditionally been considered public documents."). The tradition goes back to at least the start of the nineteenth century in England, and in this country, "[s]ince the first years of the Republic, state statutes have mandated that

clerks maintain records of judicial proceedings in the form of docket books, which were presumed open either by common law or in accordance with particular legislation." *Pellegrino*, 380 F.3d at 94.[21] As this Court has recognized, the right to access docket sheets is not dependent upon the right to access all of the underlying filings. This Court has ordered docket sheets unsealed (with any necessary redactions) despite concluding the public had a right to access only some, not all, of the underlying documents for which access was sought. *Index Newspapers*, 766 F.3d at 1092, 1094, 1097. Without unsealed docket sheets, the Court reasoned, there is not "a meaningful ability for the public to find and access those [underlying] documents … to which it is entitled." *Id.* at 1085, 1092.

Once again, the district court erred by not explaining why the historic tradition of access to docket sheets and the strong logic supporting public access did not apply to the docket Movants seek. ER-3. At no point did the district court explain why the authorities cited above, holding that such access is historic and embedded in our legal system, did not apply here. Nor did the district court explain why logic would not similarly require disclosure, even when the public may not have a right of access to some of the underlying filings on the docket.

[21] For examples of state statutes, see, e.g., 705 Ill. Comp. Stat. Ann. 105/16 (originally enacted 1887); Mich. Comp. Laws § 774.3 (originally enacted 1879); Mont. Code Ann. § 3-5-509 (originally enacted 1867); Nev. Rev. Stat. 17.170 (originally enacted 1911); N.J. Stat. Ann. § 2A:18-37 (originally enacted 1898); N.Y. Judiciary Law § 255-b (originally enacted 1920).

Without the docket sheet, Movants and the public lack the "meaningful ability . . . to find and access" those portions of the record to which they contend they are constitutionally entitled. *Index Newspapers*, 766 F.3d at 1085. Even if this Court concludes that Movants have no right to access all of the underlying materials sought, as in *Index Newspapers*, the First Amendment requires that the docket sheet be unsealed (with redactions if needed).

The labyrinthine procedural history of this case shows why public docket sheets are so important to the administration of justice. Had the docket sheets not been sealed, Movants' unsealing request could have been more targeted. For example, they would have been able to identify the contempt proceeding's case number and the particular docket entry numbers for the materials sought. Instead, as in *Index Newspapers*, there is no public court record that the contempt proceeding even exists. Movants thus found themselves in the position of describing as best they could the materials they sought to unseal (assuming they exist at all) in a matter whose very case number they do not know. This messy procedural posture perfectly illustrates why docket sheets should be public for ancillary matters such as the effort to hold Facebook in contempt here, irrespective of which case filings might properly remain sealed.

Moreover, unsealed docket sheets empower the public to identify when courts are issuing important judicial opinions. This was possible in the fight between the FBI

and Apple, for example, because the government chose to file its motion to compel Apple to unlock the San Bernardino suspect's iPhone on the public record, enabling the participation of dozens of *amici*. *See supra* Factual Background. Here, by contrast, DOJ sought to compel Facebook under seal. The public would know nothing about it were it not for journalistic reports. Were docket sheets unsealed at some point in time (even after a matter has concluded), they would provide essential transparency into investigative and judicial process.

Now that DOJ's underlying motion to hold Facebook in contempt has been resolved and criminal indictments have been brought, this Court should order the docket sheet reflecting DOJ's contempt proceeding unsealed on remand, with redactions if necessary.

B. The common-law right of access attaches to the docket sheet, which must be disclosed.

The district court also erred in holding that the Wiretap Act prevented disclosure of the docket Movants seek. Dockets are not presumptively sealed under the Wiretap Act.

Further, at common law, the presumption of access attaches to judicial documents unless they are "among those which have 'traditionally been kept secret for important policy reasons.'" *Foltz*, 331 F.3d at 1134 (quoting *Times Mirror Co.*, 873 F.2d at 1219). Docket sheets do not fall into that exception. Since the founding, dockets have been "presumed open either *by common law* or in accordance with

particular legislation." *Pellegrino*, 380 F.3d at 94 (emphasis added). "Historically, dockets and docket sheets have been open for public inspection." Thomas, *supra*, at 1542. The common-law presumption of access is likewise strong even when the entire record of a case is sealed, as here. *See Phoenix Newspapers*, 156 F.3d at 946 (stating that there is a strong presumption in favor of general public access to records); *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (vacating the order that granted defendant's motion to place the entire record under seal). The docket serves as the base document from which all other court records can be found. The presumptive common-law right of access to judicial records extends to the docket sheets that function as an index of those records. *See United States v. Criden*, 675 F.2d 550, 559 (3d Cir. 1982) ("The case dockets maintained by the clerk of the district court are public records."); *Pub. Citizen*, 749 F.3d at 268 ("By sealing the entire docket sheet . . . courts effectively shut out the public and the press from exercising their constitutional and common-law right of access to civil proceedings.").

The district court erred in holding that "the common law right of access does not attach to the materials requested" (which include docket sheets). ER-4. *See In re Search Warrant for Secretarial Area Outside Off. of Gunn*, 855 F.2d 569, 575 (8th Cir. 1988) (unsealing docket sheets associated with the district court's sealing motion). The presumptive common-law right of access does not give way because the docket sheets at issue ultimately pertain to a wiretap matter that was sealed pursuant

to Title III. *See* ER-4 (holding that "Title III supersedes any arguable common law right").

Title III presumptively requires the sealing of wiretap recordings, applications and orders granted, 18 U.S.C. § 2518(8)(b), but Appellants do not seek those particular materials. Rather, they seek redacted docket sheets from the ancillary contempt proceeding. These documents fall far outside of Title III's sealing provisions.

And even when underlying documents should stay sealed, a court can (and should) still order the docket sheets to be unsealed. *See Index Newspapers*, 766 F.3d at 1084–85, 1088, 1090, 1097 (ordering the docket sheets for contempt proceedings ancillary to grand jury investigation to be unsealed, despite denying access to certain records from those ancillary proceedings that contained information about matters occurring before the grand jury on the grounds that any common-law right of access was overcome by interest in maintaining grand jury secrecy). Courts have ordered docket sheets unsealed (with redactions) even where they concluded that the underlying documents properly remained sealed by statute. *E.g.*, *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) (two federal statutes prohibited disclosure of identifying information about student with disabilities; appeals court ordered district court to release a redacted docket sheet, while keeping other records under seal that were "replete with" student's personal information,

without specifying whether the First Amendment or common law was the basis for its order). In another example, following an ACLU motion in the District of Maryland to unseal the docket sheets for certain search warrants authorizing the surreptitious use of surveillance software on investigatory targets' computers, the court unsealed the docket sheets of three search warrant matters at DOJ's request. *See* Gov't's Response to Mot. to Unseal Docket Sheet at 1, *In Re Sealed Docket Sheet Associated with Malware Warrant Issued on July 22, 2013*, No. 16-cv-03029 (D. Md. Nov. 4, 2016), ECF No. 17. More programmatically, the Eastern District of Virginia maintains a publicly-accessible running list of all the matters in its surveillance docket, an approach DOJ has endorsed. *See In re Leopold to Unseal Certain Elec. Surveillance Applications & Orders*, 300 F. Supp. 3d 61, 73 n.8 (D.D.C. 2018) (citing *United States v. Appelbaum*, 707 F.3d 283, 288 (4th Cir. 2013)).

This Court can draw the same distinction and unseal redacted docket sheets without offending Title III's statutory sealing regime.

CONCLUSION

For the reasons stated above, this Court should reverse the district court and order the unsealing of the materials Movants seek.

Dated: June 12, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

As defined and required by Circuit Rule 28-2.6, Movants–Appellants state that they are aware of one related case pending in this Court, *WP Company v. United States Department of Justice*, Case No. 19-15473.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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